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In The

Supreme Court of the United States

October Term, 1979

No. 79-1637

J. P. STEVENS & CO., INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, J. P. Stevens & Co., Inc., prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on January 8, 1980.

I. OPINIONS BELOW

The opinion of the court of appeals is reported at 612 F.2d 881.[1] The decision and order of the National Labor Relations Board (the Board) is reported at 240 NLRB No. 35.

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1. References to portions of the record, which are reproduced in the Appendix, are designated by their appropriate page numbers, preceded by "A".

II. JURISDICTION

The judgment of the court of appeals was entered on January 8, 1980. A timely petition for rehearing and suggestion for rehearing *in banc* was denied on February 12, 1980 (A33). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 29 U.S.C. § 160(e).

III. QUESTION PRESENTED

May the Board deprive an employer of its property rights at each of its 81 plants for a period of two years, as a remedy for isolated violations of the National Labor Relations Act, by ordering that non-employee union representatives be permitted to enter onto company property to solicit employees, because of other previously remedied violations by the employer and without giving any consideration to the employer's legitimate business interests?

IV. APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment of the United States Constitution provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

Section 7 of the National Labor Relations Act [29 U.S.C. § 157] (the Act) provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right

> to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8(a)(1) of the Act [29 U.S.C. § 158(a)(1)] provides:

> It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

Section 10(c) of the Act [29 U.S.C. 160(c)] provides in pertinent part:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.

V. STATEMENT OF THE CASE

The petitioner is a Delaware corporation with its principal office in New York, New York and is engaged in the manufacture of textile and textile-related products at 81 plants located in New England and throughout the Southeastern United States (A11). This case arose at one of the petitioner's plants located in Tifton, Georgia, during an organizing drive by the Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC (the union) in the summer of 1976 (A14-A22).

An administrative law judge of the Board found that a "lead person" at the Tifton Plant, whose supervisory authority was questioned, had asked a group of three employees if they had signed union cards and stated that break times would be handled differently if a union came in (A14, A16-A18). Both comments were made in the same conversation with the same group of employees (A16-A18). The administrative law judge also found that a shift supervisor had asked one employee, on one occasion, if he had signed a union card (A15). On the basis of these two incidents, the administrative law judge concluded that three violations of Section 8(a)(1) of the Act had occurred (A15, A18). To remedy these violations, the administrative law judge fashioned an order, limited to the Tifton Plant, which required that the petitioner cease and desist from interrogating and threatening employees and from otherwise interfering with employees' rights (A23).[2] He specifically declined to issue other requested remedies, stating that "the remedies recommended are adequate to eliminate the effects of the unfair labor practices found" (A25).

The Board adopted the findings of violations made by the administrative law judge, but substantially modified the remedial portion of his recommended order by adding numerous extraordinary remedies to be carried out at all of the employer's 81 plants (A3, A5-A6). Included among these extraordinary remedies were the following:

> 1. Authorization for union representatives to enter onto company property at each of the petitioner's 81 plants for purposes of soliciting employees in the canteens and rest and other nonwork areas, including parking lots, for a period of two years;

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2. Although the order was limited to the Tifton Plant, the administrative law judge did require corporate wide posting of a notice to employees reflecting the cease and desist order (A24).

2. Authorization for union representatives to enter onto company property at each of the petitioner's 81 plants for the purpose of attending company meetings with employees where the question of union representation is addressed, with the right of equal rebuttal time for one of the union representatives present at the meeting, for a period of two years;

3. Authorization for union representatives to enter onto company property at each of the petitioner's 81 plants for the purpose of delivering a 30-minute speech to employees on working time, in any case where the Board schedules an election in which the union participates, for a period of two years; and

4. Authorization for union representatives to enter onto company property at each of the petitioner's 81 plants for the purpose of using plant bulletin boards, for a period of one year.

On review, the Fourth Circuit Court of Appeals perfunctorily concluded that "the Board acted within its discretion to remedy those unfair labor practices established in the record" (A32). Following the company's petition for rehearing and suggestion for rehearing *in banc,* on February 12, 1980, the Fourth Circuit, with two judges dissenting and two judges not participating, declined to rehear the case.

VI. REASONS FOR GRANTING THE WRIT

While the Board has broad discretion in fashioning remedies in unfair labor practice cases, its actions must be strictly confined to the limits imposed by Section 10(c) of the Act. ". . . [T]he rule of deference to the Board's choice of remedy does not constitute a blank check for arbitrary action. The role that Congress . . . has entrusted to the courts in reviewing the Board's petitions for enforce-

ment of its orders is not that of passive conduit." *Detroit Edison Co. v. NLRB,* 440 U.S. 301, 59 L.Ed.2d 333, 348 (1979). Specifically, the Court has instructed that the Board, in fashioning remedies under the Act, must be guided by two fundamental principles: (1) the remedy must be designed "to undo the effects of violations of the Act;"[3] and (2) the remedy must adequately protect the legitimate interests of the employer.[4] Punitive remedies are prohibited. *See Republic Steel Corp. v. NLRB,* 311 U.S. 7 (1940); *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 236 (1938). It seems abundantly clear that the Board and the Court of Appeals failed to heed these requirements.

a. The extraordinary remedies ordered by the Board are not designed to undo the effects of the violations of the Act

The Board's power to command affirmative action is remedial only and "is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation when those consequences are of a kind to thwart the purposes of the Act." *Consolidated Edison Co. v. NLRB,* 305 U.S. at 236. Two acts of interrogation and one statement that breaks would be handled differently if a union came in, made by two minor supervisors and involving only four employees at one plant in Georgia, cannot be viewed as anything other than minor violations. Moreover, there is no indication in the record that the acts were brought to the attention of other employees at this Georgia plant. Certainly, no employee at any of the employer's other 80 plants in New England and other Southeastern States

3. *Detroit Edison v. NLRB,* 59 L.Ed.2d at 347.

4. *Id.,* 59 L.Ed.2d at 346-48.

felt the coercive effects of the actions.[5] The remedies the Board traditionally imposes for such minor violations are the entry of a cease and desist order and the posting of a notice to employees. *See J. P. Stevens & Co., Inc.*, 243 NLRB No. 159 (1979) (involving four acts of coercion and restraint at one of this same employer's plants in Alabama during 1977, where only traditional remedies were ordered because only "limited violations of a less than severe nature" were involved). With only certain differences not here contested, this is what the administrative law judge did in the instant case, and the general counsel of the Board who prosecuted the case made no objection that the judge's failure to impose various "access" remedies was error (A29). Nevertheless, the Board felt justified in authorizing the entry of union organizers to all of the employer's 81 plants, because of the employer's history of "violations of employee rights and its flagrant disregard of Board decisions" (A3).

The litigation history of this employer, involving unfair labor practices found to have occurred during the period from 1963 through 1975 is well documented.[6] Most of the cases in which the Court granted enforcement of the

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5. Nevertheless, this contingency was covered by the administrative law judge, who ordered that a notice be posted at all 81 plants of the employer. *Supra* note 2.

6. *See J. P. Stevens & Co., Inc. v. NLRB*, 380 F.2d 292 (2d Cir. 1967), *cert. denied*, 389 U.S. 1005 (*Stevens I*); *Textile Workers Union of America, AFL-CIO v. NLRB*, 388 F.2d 896 (2d Cir. 1967), *cert. denied*, 393 U.S. 836 (*Stevens II*); *J. P. Stevens & Co., Inc. v. NLRB*, 406 F.2d 1017 (4th Cir. 1968) (*Stevens III & IV*); *J. P. Stevens & Co., Inc. v. NLRB*, 417 F.2d 533 (5th Cir. 1969) (*Stevens V*); *The Black Hawk Corp. v. NLRB*, 431 F.2d 900 (4th Cir. 1970) (*Stevens VI*) (enforcement denied); *J. P. Stevens & Co., Inc. v. NLRB*, 441 F.2d 514 (5th Cir. 1971) (*Stevens VII*); *J. P. Stevens & Co., Inc. v. NLRB*, 449 F.2d 595 (4th Cir. 1971) (*Stevens VIII*) (enforcement denied); *J. P. Stevens & Co., Inc. v. NLRB*, 461 F.2d 490 (4th Cir. 1972) (*Stevens IX*); *J. P. Stevens & Co., Inc.*, 183 NLRB 267 (1970) (*Stevens X*) (no appeal; Board order nullified in view of court's reversal of *Stevens VI*); *NLRB v. J. P. Stevens & Co., Inc.*, 455

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Board's orders involved unfair labor practices in the employer's plants in North and South Carolina, and the remedies were always restricted to either the particular plants involved in the violations or the plants in North and South Carolina. *See Stevens I, II, III, IV, VI, VIII, IX, X, XIII, XIV, XV, XVI,* and *XVIII.* None of this litigation history involved the employer's plant in Tifton, Georgia, which is the subject of this proceeding. The last of the court orders was in 1977 and involved contempt proceedings, as distinguished from unfair labor practice proceedings governed by Section 10(c) of the Act. *See Stevens XVIII.* The sanctions imposed were designed to require the employer to expunge its acts of repeated contempt and represented the most severe non-monetary penalties ever imposed by a court of appeals upon an employer for violations of the Act. Yet, not even those remedies were extended to any of the employer's plants outside North and South Carolina, the two states in which the violations were found to have occurred. *Since the entry of this last contempt order, the Board has made no claim that the employer has violated any commitments under court orders.*

The petitioner having complied with the harsh remedies imposed as a result of previous violations, the Board does not possess the authority to *re-punish* it for those violations. The remedies ordered in the instant case must

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Footnote continued—

F.2d 607 (5th Cir. 1972) (*Stevens XI*); *Textile Workers Union of America, AFL-CIO v. NLRB,* 475 F.2d 973 (D.C. Cir. 1973) (Board order remanded) and *J. P. Stevens & Co., Inc.,* 205 NLRB 1032 (1973) (Board order on remand) (*Stevens XII*); *NLRB v. J. P. Stevens & Co., Inc.,* 464 F.2d 1326 (2d Cir. 1972), *cert. denied,* 410 U.S. 926 (*Stevens XIII*) (contempt); *J. P. Stevens & Co., Inc. v. NLRB,* 547 F.2d 792 (4th Cir. 1976) (*Stevens XIV* N *XV*); *J. P. Stevens & Co., Inc.,* 220 NLRB 270 (1975) (*Stevens XVI*); *NLRB v. J. P. Stevens & Co., Inc.,* 538 F.2d 1152 (5th Cir. 1976) (*Stevens XVII*) (contempt); *NLRB v. J. P. Stevens & Co., Inc.,* 563 F.2d 8 (2d Cir. 1977), *cert. denied,* 434 U.S. 1064 (*Stevens XVIII*) (contempt).

be based upon the record in *this proceeding* and the compliance posture of the petitioner at the time of *this Board order*. But it is abundantly clear that this is not the case. The extraordinary "access" remedies imposed in this case are not designed to restore the status quo and bear no resemblance to the violations found. The Board did not, and indeed could not, find that the violations shown on this record were "serious" or "similar" to those which have called for harsh remedies in the past. The fact that four employees in Tifton, Georgia may have been coerced offers no excuse for permitting non-employee union organizers to enter company property to solicit employees in North and South Carolina, where the employer has admittedly brought itself into compliance with stringent contempt orders, or to warrant non-employee union organizers intervening in company meetings with employees at plants in Connecticut where no violations of the law have ever been found to exist. Indeed, it is inescapable that the Board has imposed *punitive remedies*—not because of what the petitioner has done in Tifton, Georgia—but because of the Board's continuing resentment toward this employer because of its prior litigation. These punitive actions by the Board are in direct contradiction of this Court's previous decisions. *See generally Carpenters, Local 60 v. NLRB*, 365 U.S. 651 (1961); *Republic Steel Corp. v. NLRB, supra*; *Consolidated Edison Co. v. NLRB, supra*. *See Florida Steel Corp. v. NLRB*, 587 F.2d 735, 753, note 10 (5th Cir. 1979) (where the court held that far less onerous access remedies than those imposed in the instant case were punitive).

The importance of this Court granting a writ to review and correct the Board's failure to follow the applicable decisions of this Court forbidding the imposition of punitive remedies is emphasized by the fact that the Board has been increasingly aggressive in its decisions

in ordering liberal "access" remedies to non-employee union representatives. *Compare Florida Steel Corp.*, 233 NLRB 491 (1977), *rev'd*, 587 F.2d 735 (5th Cir. 1979), with *Florida Steel Corp.*, 242 NLRB No. 195 (1979). The access remedies in the instant case represent the most extreme ones ever imposed by the Board, and yet are based upon the most isolated and minor violations of any case in which access remedies have ever been ordered. Indeed, it seems clear that the Board is attempting here to accomplish through the administrative process what Congress refused to do through the legislative process.[7]

b. The extraordinary remedies ordered by the Board do not adequately protect the legitimate interests of the employer

In exercising its remedial powers, the Board is required to adequately protect the legitimate interests of the employer. *Detroit Edison Co. v. NLRB, supra.* The employer interest which has most often gained the protection of this Court's jurisdiction in recent years is the employer's right to restrict the use of his property by union solicitors.[8] In *NLRB v. Babcock & Wilcox, supra*, the

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7. The Labor Reform Act of 1977, by amendment to Section 6 of the National Labor Relations Act, directed the Board to promulgate regulations providing "equal opportunity" for union organizers to enter onto an employer's property for the purpose of addressing employees on the issue of unionization. *House Comm. Rep. on Labor Reform Act of 1977*, 95th Cong., 1st Sess. (1977); *Hearings on S. 1883 before the Subcomm. on Labor of the Comm. on Human Resources*, 95th Cong., 1st Sess. (1977). The bill, H.R. 8410, passed the House, but was defeated in the Senate, S. 2467.

8. *NLRB v. Baptist Hospital, Inc.*, 440 U.S. 979 (1979); *Babbitt v. United Farm Workers*, ... U.S. ....., 60 L.Ed.2d 895 (1979); *NLRB v. Baylor Medical Center*, 439 U.S. 9 (1978); *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978); *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978); *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972); *Food Employees, Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

Court addressed the issue of whether non-employee union organizers, unlike employees already on the property,[9] can permissibly be denied access to an employer's property, for purposes of solicitation. The Court held that:

> [A]n employer may validly post his property against non-employee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution. 351 U.S. at 112.

The Court went on to state that in considering any grant of access to company property to non-employee union organizers the Board must affirmatively balance the rights of employees to receive organizational information pursuant to Section 7 of the Act against the employer's constitutionally protected property rights and that "*[a]ccommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other.*" 351 U.S. at 112 (emphasis added). *See Hudgens v. NLRB*, 424 U.S. at 521; *Eastex, Inc. v. NLRB*, 437 U.S. at 570-71; *Sears, Roebuck & Co. v. San Diego District Council of Carpenters*, 436 U.S. 180, 205-07 (1978).

Subsequently, in *Central Hardware Co. v. NLRB*, 407 U.S. at 544, the Supreme Court observed: "[i]n short, the principle of accommodation announced in *Babcock* is limited to labor organization campaigns, and the 'yielding' of property rights it may require is both temporary and minimal."

In the instant case the Board has violated the petitioner's property rights in the following ways:

1. By granting non-employee union representatives the right to enter onto company property to solicit

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9. *See Republic Aviation Corp. v. NLRB, supra.*

employees in the canteens and rest and other non-work areas, including parking lots;

2. By granting non-employee union representatives the right to enter onto company property to attend company meetings with employees where the question of union representation is addressed, with the right of equal rebuttal time for one of the union representatives present at the meeting;

3. By granting non-employee union representatives the right to enter onto company property to deliver a 30-minute speech to employees on working time, in any case where the Board schedules an election in which the union participates; and

4. By granting non-employee union representatives the right to enter onto company property to use plant bulletin boards.

In spite of this Court's unequivocal directive to balance carefully the right of the employees to receive information in furtherance of their self-organization against the petitioner's constitutional property rights, there is not a single word in the Board's decision or in the opinion of the Fourth Circuit which addresses this fundamental point. This failure to even discuss the property rights of the petitioner is clearly in direct contravention of the repeated admonitions of this Court.[10]

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10. The Board's inclination to ignore the specific directives of this Court and of the circuit courts of appeals was recently analyzed in some detail by the immediate former general counsel of the Board in remarks before the American Bar Association's Section of Labor and Employment Law. He concluded with the following observations:

> Unfortunately for the legal process, we have hardly exhausted the list of recent instances in which the Board has failed to engage in adequate decisionmaking. The courts are

(Continued on following page)

The gravity of the error in failing to balance the employer's property rights against the employees' organizational rights in the instant case is emphasized by the fact that no court of appeals had ever previously approved the imposition of such extreme access to an employer's property as a remedy for unfair labor practices. In fact, as noted earlier, the Fifth Circuit, without reaching the issue of the application of *Babcock & Wilcox,* stated that such remedies were punitive. *Florida Steel Corp. v. NLRB,* 587 F.2d at 753, note 10. The only other cases in which a Court of Appeals has addressed such an access question in a remedial context involved this same petitioner, and those decisions have required the balancing mandated by *Babcock & Wilcox.* In *Stevens I,* the Board ordered that the union be given access to the petitioner's bulletin boards as part of its remedy for certain unfair labor practices found to have been committed. The Second Circuit denied enforcement of this portion of the Board's order because the Board had failed to show any unique problem of union access to employees. 388 F.2d at 305.[11] In a later case involving this petitioner, *Stevens II,* the Second Circuit, noting its refusal to enforce bulletin

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Footnote continued—

> well aware of the importance of rational Board decisions to stable labor management relations, and for that reason, the courts will continue to insist, in each case, upon a demonstration that the Board has analyzed the problem and has applied its expertise in a sensible way. In such circumstances, honest differences will arise between the Board and the appellate courts, and those differences should be resolved by the Supreme Court. But inertia and reiterated claims for deference are not acceptable substitutes for Supreme Court review. The Board would do much to increase its effectiveness and would conserve precious administrative and judicial resources as well, if it would pay more attention to the well-considered views of appellate courts. Daily Labor Report No. 48, p. D-6 (March 10, 1980).

11. The Second Circuit cited as authority its own decision in *NLRB v. S. & H. Grossinger's Inc.,* 372 F.2d 26, 30 (2d Cir. 1967), which in turn cites this Court's decision in *Babcock & Wilcox.*

board access in the earlier case, nevertheless enforced such access, but only after the Board had made what the Second Circuit considered to be the necessary showing. 388 F.2d at 905-06.[12]

In striking the required balance in the instant case, the Board should have first stated precisely how *Babcock & Wilcox* can be read to cover any fact situation other than the physical inability of union organizers to reach employees. The petitioner is of the opinion that *Babcock & Wilcox* stands for the proposition that non-employee union organizers cannot be given authorization to enter onto an employer's property so long as the physical design of the particular facility in question, or the residences of the employees to be reached, permit the organizer the opportunity to put forth his message. As the Court stated in *Babcock & Wilcox*: "[W]hen the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize." 351 U.S. at 112. *See Sears, Roebuck & Co. v. San Diego District Council of Carpenters*, 436 U.S. at 205-07; *Central Hard-*

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12. Subsequently, the Second Circuit, in two decisions finding the petitioner in contempt of court, imposed access remedies. The earlier decision, *Stevens XIII*, covered five plants where the unfair labor practices were committed and the later case, *Stevens XVIII*, covered all plants in the Carolinas. The remedies imposed in those cases, however, have no bearing on the issue in the instant case. They emanated from the court's use of its contempt power, which is virtually unlimited, *see Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418 (1911), and which may properly ignore the constraints imposed upon the Board under the Act. On the other hand, the extraordinary access remedies imposed by the Board in the instant case are strictly limited by the authority given the Board in 29 U.S.C. § 160(c), as delineated by Supreme Court decisions, *e.g., Babcock & Wilcox. See Consolidated Edison Co. v. NLRB*, 305 U.S. at 236. Furthermore, in both cases, the court fully explained its reasoning in ordering such penalties.

ware Co. v. NLRB, 407 U.S. at 544-45. The Board obviously is of a contrary view, since there clearly is no "inaccessibility" issue in the instant case. But it has failed to state the reasons for its view, and the petitioner believes that no valid reasons exist.

Further, assuming that *Babcock & Wilcox* can be read to permit the Board to order the entry of non-employee union organizers onto company property, as a remedy for unfair labor practices, as distinguished from the purposes outlined in *Babcock & Wilcox*, the Board should have articulated a standard defining the circumstances under which such remedies are appropriate. Obviously, two isolated interrogations and one isolated threat, by two minor supervisors at one plant, standing alone, cannot be said to require broad remedies. If that be the case, literally hundreds of employers would have been subjected to such severe remedies. The administrative law judge appeared to recognize how absurd such a standard would be, since he held that the violations were not of a nature sufficiently serious to warrant such extraordinary remedies. The general counsel of the Board agreed and did not file exceptions to these findings by the judge (A29). Yet, the Board summarily ordered such severe remedies in direct contradiction to another of its decisions against this same employer issued only a few months later. In *J. P. Stevens & Co., Inc.*, 243 NLRB No. 159, 102 LRRM 1084 (1979), the Board found that an agent of the petitioner had engaged in two acts of interrogation and a threat of discharge and had solicited an employee to engage in surveillance. The Board held: "[r]egarding the additional remedies [involving access of non-employee union organizers] sought by the Charging Party, we are not persuaded that the nature and extent of the violations in this case require additional extraordinary remedies in order to correct them. We, therefore, decline to grant any addi-

tional extraordinary remedies in this case." 102 LRRM at 1085. The petitioner submits that the Board's treatment of these two cases involving the same petitioner is totally inconsistent and that this inconsistency stems from the absence of any enunciated standards for imposing such remedies.

On the property rights side of the balancing question, the Board should have fully analyzed how the entry of union organizers onto company property at all of the petitioner's 81 plants for a period of two years constituted only a "temporary and minimal" yielding of the petitioner's property rights. *See Central Hardware Co. v. NLRB*, 407 U.S. at 545. The petitioner is of the view that the remedies imposed run roughshod over the "temporary and minimal yielding" standard established by the Supreme Court. Again, however, this petitioner and all other employers subject to the Board's jurisdiction can only guess as to how the Board was able to squeeze the gross property invasions in the instant case within the purview of *Babcock & Wilcox*.

The Board's error in its handling of this case cannot be permitted to stand. It has imposed far-reaching access remedies, in violation of the petitioner's constitutional rights, without even recognizing the controlling decisions of the Supreme Court. The Board's application of these remedies to other employers[12] gives all of the indications that these onerous burdens will continue to be applied in the future. The Supreme Court has never before considered the novel and important question of whether the Board has the authority to deny an employer its property rights by permitting union organizers to enter its plants *as a remedy for unfair labor practices*, and a failure to grant a writ in this case will virtually license the Board to continue to deny employers their constitutional rights.

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12. *Supra* at 10.

VII. CONCLUSION

In summary, the Board found three minor violations to have occurred at one of the petitioner's plants in 1976. As a remedy, it ordered that union organizers be permitted to enter onto company property at each of the petitioner's 81 plants. This order by the Board was not supported by any explanation as to the necessity for such access and is unlawful for two reasons: (1) it is a punishment rather than a remedy; and (2) it does not protect the petitioner's legitimate property rights. Furthermore, the order is at variance with another Board order against this same petitioner, which rejected corporatewide access as a remedy for minor violations at a single plant. The Board's order constitutes an abuse of discretion, in violation of the petitioner's constitutional rights, and should be set aside to the extent it grants nonemployee union organizers extraordinary access to the petitioner's property. For these reasons, a writ of certiorari should be issued.

Respectfully submitted,

J. FRANK OGLETREE, JR.
HOMER L. DEAKINS, JR.
Attorneys for Petitioner

Of Counsel:

OGLETREE, DEAKINS, SMOAK, STEWART AND EDWARDS
3920 First National Bank Tower
Atlanta, Georgia 30303
(404) 588-1300

CERTIFICATE OF SERVICE

It is hereby certified that copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, have been mailed, postage prepaid, through the United States mail, to each of the following persons at the addresses indicated below:

Wade H. McCree, Jr.
Solicitor General
Department of Justice
Washington, D.C. 20530

Elliott Moore, Esquire
Deputy Associate General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

William H. McHugh, Jr., Esquire
600 Rhodes-Haverty Building
Atlanta, Georgia 30303

Arthur Goldberg, Esquire
General Counsel
700 Broadway
New York, New York 10003

This 22nd day of April, 1980.

HOMER L. DEAKINS, JR.

APPENDIX

Case 10-CA-12350

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

J. P. STEVENS & COMPANY, INC.

and

AMALGAMATED CLOTHING & TEXTILE WORKERS UNION, AFL-CIO

DECISION AND ORDER

(Dated January 23, 1979)

On December 22, 1977, Administrative Law Judge Jerry B. Stone issued the attached Decision in this proceeding. Thereafter, the General Counsel filed an exception and a supporting brief; the Charging Party filed exceptions and a brief, a reply to Respondent's supplemental brief, and a motion to remand to the Administrative Law Judge; and Respondent filed cross-exceptions and a brief, an answering brief to the exceptions of General Counsel and Charging Party, a supplemental brief, and a reply brief to the motion to remand.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge, and to adopt his recommended Order as modified herein.

1. After the close of the hearing, but prior to issuing his Decision herein, the Administrative Law Judge issued a Notice To Show Cause why he should not take notice, in determining the appropriate remedy, of prior Board and court decisions involving Respondent, to which the Charging Party and General Counsel had referred in their briefs. Respondent filed a timely brief (refiled herein as its supplemental brief). Subsequent to the issuance of the Administrative Law Judge's Decision, the Charging Party filed a reply thereto and a motion to reopen the record (refiled herein). The Charging Party also filed with the Board a motion to remand to the Administrative Law Judge for consideration of its motion to reopen. The Charging Party's motion to remand is hereby denied as lacking in merit.

2. Although the complaint alleged that on or about May 10, 1976, Supervisor Dale Stevenson unlawfully interrogated and threatened employees, the Administrative Law Judge failed to consider the testimony of Joe Louis Robinson that Stevenson asked him during a conversation if he had "mailed in his union card yet." Stevenson, in denial, recalled no such conversation. There is an issue of credibility which, however, cannot be determined from the record as a whole because the Administrative Law Judge discredited Stevenson's testimony in one instance and credited it in another. Rather than remand the case for resolutions of credibility, we believe it would better serve the purposes of the Act to decide the case now, dismissing this aspect of the complaint, particularly because the remedy would not in any event be affected. Accordingly, the complaint insofar as it alleges unlawful threats to and interrogation of employee Robinson is dismissed.

3. In his exception the General Counsel requests that the Board's Order be applied to all of Respondent's plants.

In view of Respondent's history of serious and similar violations of the Act,[1] and its disregard of past Board Orders,[2] we find merit in the General Counsel's exception. Accordingly, we shall order Respondent to cease and desist from engaging in unfair labor practices on a corporate-wide basis. See *J. P. Stevens & Co., Inc.*, 239 NLRB No. 95 (1978).

4. The Charging Party also seeks certain additional remedies. Considering Respondent's long history of violations of employee rights and its flagrant disregard of Board decisions and court orders, and for the reasons set forth in *J. P. Stevens & Co., Inc., supra,* we shall grant the following additional remedies: mailing of the notice to all employees, reading of the notice, union access to bulletin boards and lists of employees names and addresses, and in-plant access for the Union. In addition, as Respondent contends that the alleged violations, if any, were committed by two minor supervisors, we shall order Respondent to issue written instructions to all of its supervisors at the plant involved herein to comply with the notice to employees marked "Appendix A."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Ad-

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1. See *J. P. Stevens and Co., Inc.*, 157 NLRB 869 (1966); 163 NLRB 217 (1967); 167 NLRB 258 (1967); 171 NLRB 1202 (1968); 179 NLRB 254 (1969); 181 NLRB 666 (1970); 183 NLRB 25 (1970); 186 NLRB 180 (1970); 190 NLRB 751 (1971); 205 NLRB 1032 (1973); 217 NLRB 513 (1975); and 220 NLRB 270 (1975). See also *The Blackhawk Corporation*, 177 NLRB 944 (1969), and 183 NLRB 267 (1970).

2. Respondent has been found in civil contempt by various United States courts of appeals. See *N.L.R.B. v. J. P. Stevens & Company, Inc., Gulistan Division*, 538 F.2d 1152 (5th Cir. 1976); *N.L.R.B. v. J. P. Stevens & Co., Inc.*, 563 F.2d 8 (2d Cir. 1977).

ministrative Law Judge, as modified and set out in full below and hereby orders that the Respondent, J. P. Stevens & Company, Inc., New York, New York, its officers, agents, successors, and assigns, shall, on a corporate-wide basis:

1. Cease and desist from:

(a) Coercively interrogating employees about their or other employees' union activities or desires.

(b) Threatening employees with reprisals because of their union activities or protected concerted activities.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Post in conspicuous places in each of Respondent's plants, including all places where notices to employees are customarily posted, for a period of 60 consecutive days, copies of the attached notice marked "Appendix A." Copies of said notice,[3] on forms provided by the Regional Director for Region 10, shall be signed on behalf of Respondent by its president and the chairman of its board of directors, and, in addition, by each of the other members of the board of directors and by the highest managerial official of the plant in which the notice is posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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3. In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(b) Reproduce and mail to the home of each of its employees at all of its plants a facsimile of the aforesaid signed notice, together with the letter appended hereto as "Appendix B." Said letter shall be reproduced on the Company's regular business stationery and signed by the highest official of the recipient's plant. Also include in appropriate company publications, such as employee newsletters, a copy of the notice, together with Appendix B. Respondent shall provide the Regional Director for Region 10 with proof of such mailing and publication.

(c) Reproduce and give to each supervisor at its Tifton, Georgia, facilities a facsimile of the aforesaid signed notice, and give written instructions, signed by the highest official at the plant, to each supervisor to comply with the provisions of the notice. Respondent shall provide the Regional Director for Region 10 with proof of its compliance with this paragraph.

(d) At such reasonable time after the entry of this Order, as the Board may request, convene during working time by departments and shifts all its employees in each of its plants, and, at its option, either have the notice read by the highest managerial official in the plant or provide facilities and permit a Board agent to read the notice to the said employees. In the event Respondent chooses to have the notice read by its official, the Board shall be afforded a reasonable opportunity to provide for the attendance of a Board agent.

(e) Upon request of the Union, made within 2 years from the date hereof, immediately grant the Union and its representatives reasonable access to the plant bulletin boards and all places where notices to employees are customarily posted, at each of Respondent's plants, for a period of 1 year from the date of request.

(f) In the event that during a period of 2 years following entry of this Order, any supervisor or agent of Respondent convenes any group of employees at any of Respondent's plants and addresses them on the question of union representation, give the Union reasonable notice thereof and afford two union representatives a reasonable opportunity to be present at such speech and, upon request of said representatives, permit one of them to address the employees for the same amount of time as Respondent's address.

(g) If, within the next 2 years, the Board schedules an election in which the Union participates at any of Respondent's plants, then, upon request by the Union, afford at least two union representatives reasonable access to each of Respondent's said plants and appropriate facilities to deliver a 30-minute speech to employees on working time, the date thereof to be within 10 working days before but not within 48 hours prior to any such election.

(h) Upon request of the Union, immediately furnish it with lists of the names, addresses, and classifications of all of Respondent's employees at each of its plants as of the latest available payroll date, and furnish a corrected, current list to the Union at the end of each 6 months thereafter during the 2-year period referred to above.

(i) For the 2-year period, upon request of the Union, without delay, permit a reasonable number of union representatives access for reasonable periods of time to all its canteens and rest and other nonwork areas, including parking lots, within each of its plants, for the purpose of communicating orally and in writing with the employees in such areas during changes of shift, breaks, mealtimes, or other nonwork periods. Respondent shall formulate rules on this subject in the same manner as provided in *J. P. Stevens & Co., Inc.*, 239 NLRB No. 95 (1978).

(j) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the allegations of unlawful conduct not specifically found to be violative herein shall be dismissed.

Dated, Washington, D.C. January 23, 1979

John H. Fanning, Chairman
Howard Jenkins, Jr., Member
John C. Truesdale, Member
(Seal) National Labor Relations Board

APPENDIX A

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board

An Agency of the United States Government

After a hearing at which all sides had an opportunity to give evidence, the National Labor Relations Board has again found that we violated the National Labor Relations Act. We intend to abide by the following:

The Act gives all employees these rights:

To engage in self-organization

To form, join, or help unions

To bargain collectively through representatives of their own choosing

To act together for purposes of collective bargaining or other mutual aid or protection

To refrain from any or all these things.

WE WILL NOT coercively interrogate our employees about their or other employees' union activities or desires.

WE WILL NOT threaten employees with reprisals because of their union activities or protected concerted activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights under the National Labor Relations Act.

WE WILL send to all our employees copies of this notice, with an explanatory letter; WE WILL give all our supervisors at Tifton, Georgia, copies of this notice and instruct them to comply with its provisions. WE WILL read this notice to all our employees; and WE WILL grant the Union, as ordered, access to our bulletin boards, access to our nonwork areas, speaking opportunities, and lists of the names and addresses of our employees at many of our plants.

J. P. Stevens & Co., Inc.
(Employer)

Dated: ..... By .....
(President)

..... By .....
(Chairman of the Board of Directors)

..... By .....
(Member of the Board of Directors)

..... By .....
(Member)

..... By .....
(Member)

..... By .....
(Plant Manager)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 101 Marietta Tower, Suite 2400, 101 Marietta Street, NW., Atlanta, Georgia 30303, Telephone 404-221-2894.

APPENDIX B

Dear Stevens Employee:

This letter, and the enclosed notice, is being sent to all J. P. Stevens employees to inform you of a recent decision by the National Labor Relations Board* relating to the Stevens facilities in Tifton, Georgia.

The Amalgamated Clothing & Textile Workers Union of America, AFL-CIO, has been trying to organize the Tifton hourly employees for the purpose of having them select that Union as their collective-bargaining representative. After a hearing the National Labor Relations Board found that the Company interfered with, restrained, and coerced employees in the exercise of their rights under the National Labor Relations Act.

As you can see from the enclosed notice, the Company has promised that, in the future, we will comply in good faith with the labor laws.

Sincerely yours

(Plant Manager)

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*If the Board's Order is enforced by a court of appeals, insert at this point, "approved by a United States Court of Appeals."

Case 10-CA-12350

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

J. P. STEVENS & COMPANY, INC.

and

AMALGAMATED CLOTHING & TEXTILE WORKERS UNION, AFL-CIO

Michael B. Frost, Esq., for the General Counsel.

J. R. Goldthwaite, Jr., Esq., and *William McHugh, Esq.* (*Adair, Goldthwaite & Daniel, P.A.*), of Atlanta, GA, and *Arthur Goldberg, Esq.*, of New York, NY, for the Charging Party.

Lewis T. Smoak, Esq., and *M. Baker Wyche, III, Esq.* (*Ogletree, Deakins, Smoak & Stewart*), of Greenville, SC, for the Respondent.

DECISION

(Dated December 22, 1977)

Statement of the Case

JERRY B. STONE, Administrative Law Judge: This proceeding, under Section 10(b) of the National Labor Relations Act, as amended, was tried pursuant to due notice on September 14 and 15, 1977, at Tifton, Georgia.

The charge was filed on October 26, 1976. The amended complaint in this matter was issued on May 25, 1977. The issues concern (1) whether Josephine Brooks is a supervisor within the meaning of Section 2(11) of the Act and (2) whether the Respondent, by certain supervisors, engaged in conduct violative of Section 8(a)(1) of the Act by (a) creation of the impression of surveillance of employee union activities, (b) promise of benefits, (c) threats of reprisals, and (d) interrogation of employees about their or other employees' union activities.

All parties were afforded full opportunity to participate in the proceeding. Briefs have been filed by the General Counsel, the Charging Party, and the Respondent and have been considered.

Upon the entire record in the case and from my observation of witnesses, I hereby make the following:

Findings of Fact

I. The Business of the Employer

The facts herein are based upon the pleadings and admissions therein.

J. P. Stevens & Company, Inc., the Respondent, is, and has been at all times material herein, a Delaware corporation, with an office and place of business located at Tifton, Georgia, where it is engaged in the manufacture of cloth products.

Respondent, during a representative 1-year period, sold and shipped finished products valued in excess of $50,000 directly to customers located outside the State of Georgia.

As conceded by Respondent and based upon the foregoing, it is concluded and found that the Respondent is, and has been at all times material herein, an employer

engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization Involved[1]

Amalgamated Clothing & Textile Workers Union, AFL-CIO, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *Supervisory Status*

1. The status of Dale Stevenson is not disputed. Upon consideration of the original complaint and answer, the amended complaint and answer, and the credited testimony of witnesses, it is concluded and found that Dale Stevenson occupied the position of Shift Foreman for the Respondent and is and was a supervisor within the meaning of Section 2(11) of the Act.

2. The status of Arlie Blevins is not disputed. Upon consideration of the pleadings and admissions therein and the credited testimony of witnesses, it is concluded and found that Arlie Blevins is an overseer and is and was a supervisor within the meaning of Section 2(11) of the Act.

3. The status of Josephine Brooks is disputed. The General Counsel alleges and contends that Brooks is a supervisor within the meaning of Section 2(11) of the Act. The Respondent contends that Brooks does not possess the authority of a supervisor within the meaning of Section 2(11) of the Act.

Josephine Brooks is employed as a section leader in Respondent's mending department. The overall supervisor

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1. The facts are based upon the pleadings and admissions therein.

of such department is Arlie Blevins. Said department has approximately 110 employees and has 3 section leaders. Brooks' section has approximately 30 employees. Employees in the mending department are classified as menders, regraders, and cloth suppliers. Brooks has been a section leader for approximately 13-14 years. Section leaders receive a higher rate of pay than other employees. Thus, section leaders receive $4.28 per hour as compared to $3.90 per hour for regraders and $3.66 per hour for menders.

Brooks' duties include supplying the needs of menders, looking for defects to determine what needs to be done and how to repair and deciding whether to repair items. Brooks mends only on rare occasions. Brooks keeps time records on employees in her section, passes out paychecks to employees in her section, and has a desk in Blevins' office and a key to said office. Some critical styles of cloth are inspected by regraders. If defects are noticed, usually the section leader decides whether the material passes and proceeds to finishing or is returned to the mender for repairing, but not on production time. Section leaders must initial certain tickets for employees to receive incentive pay. Section leaders also can "no-credit" work resulting in employees being paid in accordance with time as opposed to "production." In the absence of Supervisor Blevins, section leaders oversee their sections in the department.

Brooks exercises authority in a limited way as regards granting time off to employees. Brooks testified to the effect that she had been granted authority to grant time off on a limited basis when an employee had a doctor's or dental appointment. Testimony of employee Henderson, however, revealed that Brooks granted her a day off on two occasions for personal reasons. Most persuasive was employee Robinson, a witness for the Respondent, who

testified that Brooks had authority on minor matters to grant time off and that she had been granted time off by Brooks to go to the bank or to attend to personal business.

Considering all of the foregoing, I am persuaded that the facts reveal that Brooks has authority to responsibly direct work of employees in her section, that Brooks exercises judgment in an independent manner affecting employee earnings, and exercises independent judgment in granting employees time off for a day or less involving personal business. Such authority and conduct reveal that Brooks is a supervisor within the meaning of Section 2(11) of the Act. It is so concluded and found.

B. *The Events of May 10, 1976*[2]

On May 10, 1976, Supervisor Stevenson spoke to Burks in the back of the plant. Stevenson asked Burks if he had signed a union card. Burks told Stevenson that he had signed a union card. Stevenson asked Burks why he had signed a union card. Burks told Stevenson that he had signed a union card because he wanted better benefits and more days off for vacation. Stevenson told Burks that he had done a fool thing, that he could take 2 weeks' vacation if he put in for it ahead of time.

Respondent's vacation-pay policy is as follows: An employee who has been employed for 1 year as of June 15 of the current year is entitled to 2 percent of said employee's gross earnings and 1 week's time off. An employee

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2. The two witnesses to the events of May 10, 1976, were employee Burks and Supervisor Stevenson. Burks testified to interrogation by Stevenson. Stevenson's testimony was not in denial that such interrogation occurred but was of the "I don't recall" type answer. Burks testified to a conversation about vacation time. Stevenson's testimony was in denial that he promised Burks vacation time if he rejected the Union. I credit Burks' testimony over Stevenson's as to the events in question.

who has been employed for 5 years as of June 15 of the current year is entitled to 4 percent of said employee's gross earnings and 2 weeks' time off. An employee who has employed for 15 years as of June 15 of the current year is entitled to 6 percent of said employee's gross earnings and 3 weeks' time off. The above policy was in effect at the time of Stevenson's statements to Burks on May 10, 1976.

Burks was employed initially sometime apparently shortly after July 1, 1971. Burks in accordance with the Respondent's vacation-pay policy had been receiving 1 week's time off and 2 percent of his gross earnings for vacation pay.[3] Since Burks would not have completed 5 years of employment by June 15, 1976, Burks would not have been entitled to 4 percent of his gross earnings or 2 weeks' time off as regards the 1976 vacation-pay plan. Rather, Burks would have been entitled to receive 2 percent and 1 week's time off around July 1976 and would have been entitled as of June 15, 1977, to the 4 percent of his gross earnings and 2 weeks' time off. Burks testified to the effect that the conversation with Stevenson on May 10, 1976, was the first conversation wherein he had been told that he could have 2 weeks off.

Considering the foregoing, I am persuaded and conclude and find, as alleged, that the Respondent, by Stevenson, unlawfully interrogated Burks about his union activity on May 10, 1976. There is no evidence of legitimate need for such interrogation. Nor is there evidence that assurances of nonreprisal were given to Burks by Stevenson. Under such circumstances, the interrogation of Burks as to his union activity was coercive in nature and therefore violative of Section 8(a)(1) of the Act. It is so concluded and found.

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3. The 2 percent of gross earnings appears to be substantially equivalent to an average week's pay.

Considering the foregoing, I am persuaded and conclude and find that the statements of Stevenson to Burks did not constitute, as alleged, unlawful promise of benefits to employees if the employees rejected the Union. First, there is no evidence that Stevenson spoke to Burks concerning vacation pay or time off based upon the question of rejection of the Union. Further, it is clear that the Respondent had a vacation plan in existence and that Burks was receiving a 1-week vacation in accordance with the plan. Although Burks testified to the effect that this was the first time he had been told that he could take a 2-week vacation if he put in for it, I find it hard to believe that an employee of approximately 5 years' duration would not be aware of the general outline of the vacation-pay plan and aware that after 5 years as of June 15 of the year that he would be entitled to a 2-week vacation. I am persuaded that under such circumstances the remarks suggest that Stevenson may have been confused as to exactly when Burks had been initially employed and that Stevenson's remarks were intended merely as argument relating to the existing plan as opposed to Burks' reasons for wanting a union. Further, I am persuaded that Burks would reasonably recognize Stevenson's statements as arguments and not as promise of benefits dependent upon rejection of the Union. Accordingly, the allegation of unlawful conduct in such regard is recommended to be dismissed.

C. *Events of June 21, 1976*[4]

On June 21, 1976, Supervisor Brooks approached employee Henderson at her machine and asked Henderson if she had attended a union meeting at the Ramada Inn.

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4. The facts are based upon the credited testimony of Henderson and Byrd. I found Henderson and Byrd both to appear more frank, forthright and truthful appearing witnesses than Brooks. I credit their testimony over Brooks' where in conflict.

Henderson told Brooks that she did not know that she had been supposed to go to the meeting. At this time someone called Brooks and Brooks left Henderson.

On June 21, 1976, Supervisor Brooks approached employee Byrd at her table while Byrd was talking to several fellow employees. What occurred is revealed by the following credited excerpts from Byrd's testimony.

* * *

> Well, we was there talking and Jo, she come up, and we was talking about the union and she asked us if we'd signed a union card, but Mary Ann and I, we had; Beverly, she hadn't. And she asked did we know anybody who had signed a union card and we told her no. So she asked us did we go to the meeting down at the Ramada Inn. So she asked us did we see any cars down there and we told her no, but Beverly had seen Billy Kimbrough's truck, and she told her.

* * *

> And she said all the things that J. P. Stevens had done for Billy Kimbrough while he was pushing the union and she was needed on the perch, so she left.

* * *

> Well, she said that we had it good then, but if the union come in things like we could come in and, like, if we had to leave or something, we could leave; but if the union come, we couldn't do it.

* * *

> Well, she said that Beverly was working eight hours more or less like we wanted to but the union would—well if the union come in we would have breaks and things now, that we would just have our breaks and we would have to give the union them eight hours.

* * *

She said with the hours, like, now we worked eight hours and we have breaks and maybe sometimes you don't go right back after the break is over; but she said if the union was in, that soon as that break over you'll have to be right back at work.

* * *

Considering the foregoing, I am persuaded and conclude and find, as alleged, that the Respondent, by Brooks, engaged in unlawful interrogation of employees about their and other employees' union activities. There is no evidence of legitimate need for such interrogation. Nor is there evidence that assurances of nonreprisals were given to the employees. Under such circumstances, such interrogation as to union matters was coercive in nature and violative of Section 8(a)(1) of the Act. It is so concluded and found.

Considering the foregoing, I am persuaded, and conclude and find, that the Respondent, by Brooks, as alleged, threatened employees with reprisals, tougher work conditions, if the Union were selected. Such conduct is violative of Section 8(a)(1) of the Act. It is so concluded and found.

D. *Events of August 1976*[5]

On a day in August of 1976, employee Sue Domingue was at her machine talking to an employee named Opal

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5. The facts are based upon a composite of the credited aspects of the testimony of Domingue and Blevins. Weeks was also presented as a witness to the issues involved in the events. Weeks clearly appeared to be an unreliable witness, lacking in frankness and forthrightness. I discredit her testimony. Domingue and Blevins both appeared to be witnesses attempting to tell the truth. Domingue, however, appeared reluctant to speak loudly enough to be heard. Domingue did not appear to have a reasonably precise recollection of when the event occurred. In sum, I find Blevins to appear a more reliable witness as to the events in August 1976 and credit his testimony over Domingue's where in conflict.

Weeks about the Union. Weeks and Domingue had talked about the Union in the past, and Weeks had expressed the opinion that the plant would be closed if the Union came in. On this occasion in August of 1976, Weeks expressed such opinion to Domingue. While Weeks and Domingue were talking, Supervisor Blevins walked up and asked them what they were talking about. Weeks and Domingue told Supervisor Blevins that they were talking about the Union. Domingue asked Supervisor Blevins what would happen if the Union came in. However, Weeks stated in effect again that the plant would shut down if the Union came in. Blevins made no comment and turned and walked away.

Considering the foregoing, I am persuaded and conclude and find that the facts do not establish, as alleged, that the Respondent, by Blevins, on August 15, 1976, threatened its employees that it would close the plant if the Union were successful in its organizational campaign. The General Counsel contends mainly that Supervisor Blevins specifically made a statement constituting a threat as alleged. Witness Domingue testified in effect to such a specific statement by Blevins. I have credited Blevins' testimony to the effect that he did not make such statement and have discredited Domingue's testimony to such effect. The General Counsel, however, further contends that if the facts are as found herein, that the Respondent, by Blevins, in effect adopted such statements of a threatening nature made by Weeks by virtue of Blevins' silence at the time. The General Counsel argues that the facts and findings thereupon in *Richland Textiles, Inc.*, 220 NLRB 615, 619, support a finding of violative conduct by the silence of Supervisor Blevins in the face of Weeks' statement. I reject such contention. Generally speaking, a respondent is not responsible for statements made by a

third party who is not an agent. The *Richland* case findings and conclusions of law represent in effect an exception to the general rule. In the *Richland* case the respondent was held liable for the failure to repudiate letters written by a prominent citizen which were distributed in such a manner as to indicate that the letters were authoritative. In the instant case, there is no evidence to reveal that Weeks was a person who employees should believe had inside or authoritative information or conveyed such information as to so indicate. No duty arose under such circumstances for Blevins to disavow such statements. Blevins' silence and walking away from the conversation more realistically reveal that he was not getting involved in the employee discussion about the Union. Accordingly, it is recommended that the allegations of unlawful conduct in such regard be dismissed.

E. *Alleged Events of August 28, 1976*

Taylor testified to the effect that on August 28, 1976, he had a conversation with Supervisor Stevenson wherein Stevenson referred to three employees nearby who were talking and said that he did not know what they were talking about but if it were about the Union and the Union came in, that they would be sorry. Taylor testified to the effect that Stevenson asked him how he thought the Union was doing and that he (Taylor) responded that he didn't know. Taylor also testified that Stevenson stated that he knew which seven people from A shift went to the first union meeting. Stevenson denied making such statements.

Cross-examination of Taylor as to how he recalled that the events occurred on August 28, 1976, revealed in my opinion that Taylor had no independent recollection of the date of August 28, 1976, but relied on the fact that such date was used in a pretrial statement. Thus, when

questioned, Taylor repeated the date of August 28, 1976, as the date of the event but no reason for the recollection of such date. Taylor, however, placed the day of the week of the event as being Thursday. It is noted that August 28, 1976, occurred on a Saturday. Part of Taylor's confusion as regards his pretrial statement and statement to the NLRB appears to flow from the fact that a pretrial statement was taken from Taylor close to the time of the alleged events, that at a much later date this statement became his NLRB pretrial affidavit when submitted to the NLRB and sworn to before an NLRB agent. Taylor later received a copy of such statement back from the General Counsel when he received his trial subpoena. In such statement were statements by Taylor pertaining to remarks allegedly by Stevenson as to employees paid by the Union. At the trial Taylor had no recollection of such remarks by Stevenson. In many respects Taylor appeared a confused witness. I am not persuaded that his testimony is reliable and find that Stevenson's testimony in denial of the events appear more reliable. I credit Stevenson's testimony in denial over Taylor's testimony as to the alleged events.[6]

Considering the foregoing, I am persuaded and conclude and find that the evidence does not establish that Supervisor Stevenson engaged in unlawful interrogation as to union activities as regards Taylor on August 28, 1976, and does not establish that Stevenson threatened employees through Taylor with threats of reprisals on August 21 or 28, 1976. Accordingly, allegations of unlawful conduct in such regard will be recommended to be dismissed.

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6. The complaint alleges unlawful interrogation as to union activity by Stevenson as occurring on August 28, 1976. The complaint also alleges that Stevenson, on August 21, 1976, threatened an employee with reprisals. It is clear that Taylor's testimony was presented as to these two issues but as occurring on August 28, 1976.

F. *Events of September 13, 1977*[7]

On September 13, 1977, the day before the trial in this matter, Supervisor Blevins attended a meeting with company lawyers. After such meeting Blevins walked by Domingue's work station. At such time Overseer Blevins asked Domingue how she was doing. Domingue told Blevins that she was tired. Blevins told Domingue that he was tired, that there was no sense to all the mess that had been going around there that day, that he had wanted to go to a funeral and should have gone but hadn't been able to go. Domingue asked Blevins why he hadn't been able to go to the funeral. Blevins told Domingue that he had been with the lawyers all evening, that someone had said that he had said that the plant would shut down if the Union were voted in. Domingue told Blevins that he shouldn't worry about it, that it would blow over one day.

Considering the foregoing, I conclude and find that the evidence is insufficient to establish, as alleged, that the Respondent, by Blevins, threatened an employee with reprisal if she testified in a National Labor Relations Board proceeding. Accordingly, allegations of unlawful conduct in such regard will be recommended to be dismissed.

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7. The facts are based upon a composite of the credited aspects of the testimony of Domingue and Blevins. Considering Domingue's initial direct testimony and the failure to include reference therein to remarks by Blevins as to "not forgetting," I discredit Domingue's testimony to the effect that Blevins stated at the end of the conversation that "he wasn't going to forget." I credit Blevins' denial that he made such statement. I am persuaded, considering the logical consistency of the evidence, that Domingue did state in effect to Blevins that the matter would "blow over." I discredit the testimony of Domingue and Blevins inconsistent with the facts found.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in section III, above, occurring in connection with the Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the Respondent has engaged in unfair labor practices, it will be recommended that Respondent cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

Both the General Counsel and the Charging Party contended in briefs for extraordinary remedies in this case. The undersigned issued a "Notice" relating to the taking of official notice of past Board decisions relating to Respondent's history of unfair labor practices and according the Respondent the right to present argument as to whether official notice should be taken of certain prior cases involving the Respondent and argument relating to possible remedy.[8]

In accordance with such notice, I have officially noted the decisions in *J. P. Stevens and Co., Inc.*, cases, reported at 157 NLRB 869; 163 NLRB 217; 167 NLRB 266; 167 NLRB 258; 171 NLRB 1202; 179 NLRB 254; 181 NLRB

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8. Respondent's supplemental brief received following such notice has been considered.

666; 183 NLRB 25; 186 NLRB 180; 190 NLRB 751; 205 NLRB 1032; 217 NLRB 513; and 220 NLRB 270.[9]

Upon consideration of the record in this case, arguments as to remedy, the Respondent's past history of unfair labor practices of the type involved in this proceeding and of other types, and for substantially the same reasons set forth by the Board in the *J. P. Stevens* case reported at 220 NLRB 270, I find merit to the General Counsel's request that an order requiring posting of the remedial notice at all of Respondent's plants be issued.

In such case reported at 220 NLRB 270, the Board said:

> In view of the extensive history of unfair labor practice violations by this Respondent and the repeated violations of the Act which are similar to those found in this case, we find that employees of the Respondent at other plants must be assured of their rights under the Act and that other employees must be assured that they are protected against similar violations by this Respondent. Accordingly, we find it necessary in these circumstances to order that Respondent post the notice at all of its plants.

Thus, as indicated, it will be recommended that the Respondent post the required remedial notice in all of its plants.

The Charging Party, in addition to corporate-wide posting of the remedial notice, requests additional remedies of (1) mailing of the order, (2) access to bulletin boards,

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9. I do not find it necessary to consider the history of unfair labor practices referred to in *The Blackhawk Corporation* cases, reported at 167 NLRB 266 and 183 NLRB 267. Were I to consider such cases, the remedy recommended would not be affected.

(3) employee lists, (4) reading of posted notice, (5) in-plant access to employees in nonwork areas during nonwork time, and (6) awarding of costs. I am not persuaded that the violations in this case reveal the necessity for the above referred to remedies. Rather, I am persuaded that the remedies recommended are adequate to eliminate the effect of the unfair labor practices found.[10]

Because of Respondent's history of unfair labor practices, I find that an order requiring not only cessation from specific unfair labor practices but also requiring the Respondent not to interfere with protected rights in any other manner is appropriate and necessary.

Upon the basis of the above findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. J. P. Stevens & Company, Inc., the Respondent, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Amalgamated Clothing & Textile Workers Union, AFL-CIO, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

3. By interfering with, restraining, and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act, Respondent engaged in unfair labor practices proscribed by Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

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10. See *J. P. Stevens* case reported at 220 NLRB 270, 271.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[11]

ORDER

Respondent, J. P. Stevens & Company, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating employees about their or other employees' union activities or desires.

(b) Threatening employees with reprisals because of their union activities or protected concerted activities.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Post at all of Respondent's plants copies of the attached notice marked "Appendix."[12] Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by Respondent's representatives, shall be posted by it immediately upon receipt thereof, and

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11. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

12. In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 10, in writing, within 20 days from the date of receipt of this Order, what steps the Respondent has taken to comply herewith.

It is further ordered that the allegations of unlawful conduct not specifically found to be violative herein be dismissed.

Dated, Washington, D. C. December 22, 1977

/s/ Jerry B. Stone
Jerry B. Stone
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT coercively interrogate our employees about their or other employees' union activities or desires.

WE WILL NOT threaten employees with reprisals because of their union activities or protected concerted activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the Act.

J. P. Stevens & Company, Inc.
(Employer)

Dated ..... By .....
(Representative) (Title)

This Is an Official Notice and Must Not Be Defaced by Anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Peachtree Building - Room 701, 730 Peachtree Street, N.E., Atlanta, Georgia 30308, Telephone (404) 881-4741.

CASE 10-CA-12350

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

J. P. STEVENS & COMPANY, INC.

and

AMALGAMATED CLOTHING & TEXTILE WORKERS UNION, AFL-CIO

COUNSEL FOR THE GENERAL COUNSEL'S EXCEPTION TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

(Dated January 23, 1978)

Comes Now Michael B. Frost, Counsel for the General Counsel in the above-styled proceeding, and pursuant to Section 102.46 of the Board's Rules and Regulations, Series 8, as amended, files the following Exception to part of the Order of the Honorable Jerry B. Stone, Administrative Law Judge, in his Decision issued December 22, 1977.

1.

To the failure to order the Respondent to cease and desist from engaging in the unfair labor practices on a corporate-side basis (J.D. 12, 1. 1).

Dated at Atlanta, Georgia, this 23rd day of January, 1978.

Respectfully submitted,

/s/ Michael B. Frost
Michael B. Frost
Counsel for the General Counsel

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1050

J. P. Stevens & Co., Inc.,
Petitioner,

-v-

National Labor Relations Board,
Respondent.

Amalgamated Clothing and Textile Workers
Union, AFL-CIO,
Intervenor.

No. 79-1248

Amalgamated Clothing and Textile Workers
Union, AFL-CIO,
Petitioner,

-v-

National Labor Relations Board,
Respondent.

On Petition for Review of an Order of the National
Labor Relations Board.

Argued December 6, 1979 Decided January 8, 1980

Before BUTZNER and PHILLIPS, Circuit Judges, and HONORABLE WALTER E. HOFFMAN, Senior District Judge for the Eastern District of Virginia, sitting by designation.

Lewis T. Smoak (M. Baker Wyche, III, Ogletree, Deakins, Smoak, Stewart and Edwards on brief) for petitioner; James B. Coppess (Arthur Goldberg, Joel Ax; William A. McHugh, Jr., Adair, Goldthwaite & Daniel, P.A. on brief) for intervenor-petitioner; Allison Beck, National Labor Relations Board (John S. Irving, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Acting Associate General Counsel, Elliott Moore, Deputy Associate General Counsel, Howard E. Perlstein, National Labor Relations Board on brief) for respondent.

PER CURIAM:

J. P. Stevens Co., Inc. petitions for review of a corporate-wide remedial order for violations of § 8(a)(1) of the National Labor Relations Act. The Board affirmed the administrative law judge's findings that the employer had coercively interrogated employees about union activities, threatened emplyoees with reprisals because of their union activities, and interfered with, restrained, and corced employees in the exercise of their rights under § 7 of the Act. The Amalgamated Clothing and Textile Workers Union, as intervenor, challenges the Board's failure to find additional violations and its omission of reasons for denying the Union's motions to remand and for litigation costs.

Upon consideration of the record, briefs, and arguments, we conclude that substantial evidence supports the Board's order.

J. P. Stevens Co. complains of the extraordinary nature of the relief granted for acts occurring only at its Tifton, Georgia plant. A reviewing court, however, must give deference to the Board's discretion in fashioning remedies for unfair labor practices. Fibreboard Corp. v. Labor Board, 379 U.S. 203, 215-17 (1964); J. P. Stevens & Co.,

Inc. v. NLRB, 406 F.2d 1017, 1022 (4th Cir. 1968). We conclude that the Board acted within its discretion to remedy those unfair practices established in the record.

After the administrative law judge rendered his decision in December 1977, the Union moved to reopen the proceedings to obtain a bargaining order because it allegedly achieved majority status. It asked the Board to remand this issue to the administrative law judge. The Board denied the motion explaining that it was "lacking in merit". We find no error in this ruling. Since the § 8(a)(1) violations occurred in May and June 1976 and the alleged majority was obtained subsequently in November 1977, it is evident that the unfair labor practices neither undermined majority strength nor demonstrated any impediment to an election. The Board's ruling that the motion lacked merit, therefore, was appropriate. *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 610-16 (1969).

The Board's failure to discuss its denial of litigation expenses is also harmless. It is readily apparent from standards established in other Board cases that costs are awarded only for frivolous or dilatory litigation. Heck's Inc., 215 NLRB 765 (1974); Tidee Products, Inc., 194 NLRB 1234 (1972). The issues in this case have proven to be arguable and brought in good faith. In this respect the case differs from J. P. Stevens & Co., 239 NLRB No. 5 (1978), in which fees were allowed. Since the request for fees and expenses is ancillary to the major questions presented, the omission of any discussion of these established standards does not warrant remand.

ENFORCEMENT GRANTED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1050

J. P. Stevens & Co., Inc.,
Petitioner,

-v-

National Labor Relations Board,
Respondent.

Amalgamated Clothing and Textile Workers Union, AFL-CIO,
Intervenor.

No. 79-1248

Amalgamated Clothing and Textile Workers Union, AFL-CIO,
Petitioner,

-v-

National Labor Relations Board,
Respondent.

ORDER

(Filed February 12, 1980)

Upon consideration of the petition for rehearing; and

Upon consideration of the motion filed by J. P. Stevens & Co., Inc., to consolidate these petitions for review for hearing and rehearing en banc with the following:

79-1247/79-1254 - J. P. Stevens & Co., Inc./Amalgamated Clothing & Textile Workers Union, etc. v. NLRB

79-1101 - J. P. Stevens & Co., Inc., et al. v. NLRB

79-1624/79-1754 - J. P. Stevens & Co., Inc./Amalgamated Clothing & Textile Workers Union v. NLRB

79-1456/79-1664 - J. P. Stevens & Co., Inc./Amalgamated Clothing & Textile Workers Union, etc. v. NLRB

and the replies to this motion filed by the National Labor Relations Board and the Amalgamated Clothing & Textile Workers Union, intervenor;

In response to a request for a poll of the court on the motion to consolidate and for hearing and rehearing en banc, a majority of the active members of the court voted to deny the motion;

WHEREUPON, it is ADJUDGED and ORDERED:

1. The petition for rehearing is denied by the panel;

2. The motion to consolidate for hearing and rehearing en banc all of these petitions for review is denied.

Judge Widener and Judge Hall dissent from the denial of the motion to consolidate these petitions for review for hearing and rehearing en banc.

Chief Judge Haynsworth and Judge Russell did not participate in these proceedings.

/s/ John D. Butzner, Jr.
John D. Butzner, Jr.
United States Circuit Judge

ENTERED:
February 12, 1980

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1050

J. P. Stevens & Co., Inc.,
Petitioner,

versus

National Labor Relations Board,
Respondent.

Amalgamated Clothing and Textile Workers Union,
AFL-CIO,
Intervenor.

No. 79-1248

Amalgamated Clothing and Textile Workers Union,
AFL-CIO,
Petitioner,

versus

National Labor Relations Board,
Respondent.

(Filed February 19, 1980)

Upon consideration of a motion of J. P. Stevens and Co., Inc., the petitioner in No. 79-1050, for stay of mandate pending application to the United States Supreme Court for a writ of certiorari,

IT IS ORDERED that the motion is DENIED.

For the Court - by Direction.

/s/ William K. Slate, II
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1050

J. P. Stevens & Co., Inc.,
Petitioner,

-v-

National Labor Relations Board,
Respondent.

Amalgamated Clothing and Textile Workers Union,
AFL-CIO,
Intervenor.

No. 79-1248

Amalgamated Clothing and Textile Workers Union,
AFL-CIO,
Petitioner,

-v-

National Labor Relations Board,
Respondent.

ON MOTION FOR RECONSIDERATION OF THE DENIAL OF A STAY OF THE MANDATE

(Filed March 17, 1980)

Upon consideration of the motion filed by J. P. Stevens & Co., Inc., for reconsideration of the denial of a stay of the mandate;

With the concurrence of Judge Phillips and Judge Hoffman, it is ADJUDGED and ORDERED that the motion is denied.

/s/ John D. Butzner, Jr.
John D. Butzner, Jr.
United States Circuit Judge